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8 **UNITED STATES BANKRUPTCY COURT**
 9
 10 **FOR THE DISTRICT OF NEVADA**

11 In re:
 12 PAUL A. MORABITO,
 13 Debtor.

14
 15 Case No.: BK-S-13-51237-GWZ
 16 Chapter: 7

17 **Hearing:**
 18 Date: February 4, 2021
 Time: 10:00 a.m.

19 **OPPOSITION TO MOTION FOR AN ORDER IMPOSING SANCTIONS AGAINST**
 20 **JEFFREY HARTMAN, ESQ. AND HARTMAN & HARTMAN AND DAVID HOUSTON,**
 21 **ESQ. AND THE LAW OFFICES OF DAVID R. HOUSTON PURSUANT TO**
 22 **BANKRUPTCY RULE 9011**

23 Jeffrey Hartman, Esq., Hartman & Hartman, David Houston, Esq., and the Law Offices of
 24 David R. Houston (collectively, “Hartman & Houston”), through their attorneys of record, Kent.
 25 R. Robison, Esq. and Hannah E. Winston, Esq., of the law offices of Robison, Sharp, Sullivan &
 Brust, hereby oppose the Motion for an Order Imposing Sanctions (the “Motion”). This
 Opposition is made and based on the attached Memorandum of Points and Authorities,
 Bankruptcy Rule 9011, the papers and pleadings on file herein, the declarations of Jeffrey
 Hartman, Esq. and David R. Houston, Esq., and the attached exhibits.

26 **MEMORANDUM OF POINTS AND AUTHORITIES**

27 **I. INTRODUCTION**

28 Attorneys hold a cherished and crucial position in the administration of justice. Every

1 attorney must recognize inescapable and unavoidable duties of loyalty to their client. While
 2 honoring duties of loyalty and pursuing zealous representation of clients, attorneys cannot and
 3 should not be permitted to abuse the system of justice through unnecessary, vexatious or
 4 unfounded procedural machinations. As officers of the court, attorneys owe the system, the
 5 courts, their clients, and the public respect, dignity, and integrity.

6 The Independent Motion filed by Messrs. Hartman and Houston was intended to
 7 accomplish what was believed to be appropriate relief for their client. The Motion was neither a
 8 model of clarity nor as precise as it should have been. But the Nevada Supreme Court has given
 9 practitioners reasons to consider and file motions for relief under NRCP 60. This Honorable
 10 Court and the Bankruptcy Appellate Panel both indicated that there may be an independent claim
 11 for fraud on the Court. Indeed, this Honorable Court was emphatic to all involved that if a motion
 12 under Rule 60 was filed, any removal thereof would be confronted with a remand order. Whether
 13 Hartman and Houston's inferences from this Court's statement and those of the Bankruptcy
 14 Appellate Panel were justified can be argued either way. However, an argument can be made in
 15 light of this Court's comments and those of the BAP that the failure to consider the client's
 16 entitlement individually to Rule 60 relief would be risky if not precarious.

17 One of the most difficult challenges with which practicing attorneys are confronted is the
 18 ability to distinguish loyalties to the client from loyalties to the Court. In this case, there was
 19 judicial acknowledgment that Mr. Morabito was not absolutely precluded from pursuing his
 20 individual Rule 60 claims. The act of filing the Independent Motion is neither egregious nor
 21 sanctionable. Although the conduct of Messrs. Houston and Hartman must be viewed under Rule
 22 11 principles objectively, the totality of the circumstances involving an extremely difficult client
 23 and a history of acrimonious litigation is worthy of consideration.

24 If it is true that the primary purpose of Rule 11 is to deter marginal, if not questionable,
 25 conduct by lawyers, the recent interaction involving Messrs. Hartman and Houston and this Court
 26 has unquestionably accomplished all the deterrence ever contemplated by the drafters of Rule 11.
 27 This case is complicated. The client is complicated. The case involves a procedural history that
 28 spans over ten years, and it involves complex issues of law. Hartman and Houston learned the

1 procedural history of the case. Hartman and Houston relied on opinions of experts in the area of
 2 Rule 60(d) motions and the type of evidence required to demonstrate fraud on the Court. Hartman
 3 and Houston used their research and 40+ years of experience as reputable attorneys to draft the
 4 Rule 60 Motion, the Injunction Complaint, the Remand Papers, and the Stay Papers.

5 Hartman and Houston did not file the Independent Motion without having substantial
 6 support from experts, applicable case law, the transcript of this Court's comment about whether
 7 Morabito had an individual claim, and the BAP's reiteration of that legal concept. These
 8 endeavors are Rule 11 compliant. While the filings have shortcomings, it cannot be disputed that
 9 Hartman and Houston had a good faith reason to believe that they had the right to do what they did
 10 though not done with perfection. However, this Court has admonished counsel for those
 11 shortcomings and the message has been received and accepted. No further sanctions are
 12 warranted. Accordingly, the Motion should be denied.

13 **II. PROCEDURAL HISTORY**

14 The Court is well versed in the history of the case. Therefore, Hartman and Houston
 15 provide a brief recitation of the factual and procedural background relevant to the issues in the
 16 Motion for Sanctions.

17 **A. State Court Proceedings**

18 In 2007, the parties entered into an Amended and Restated Stock Purchase Agreement
 19 (“ARSPA”) wherein JH, Inc. as buyer agreed to purchase all outstanding stock of Berry-Hinckley
 20 Industries (“BHI”) from Morabito as seller. The dispute between the parties that is relevant to
 21 Morabito’s Fraud on the Court Motion (the “Independent Motion”) concerns the working capital¹
 22 of BHI. The ARSPA included a procedure for determining whether a payment adjustment was
 23 required based on the Working Capital of BHI.

24 First, Morabito was to provide the Herbst Parties with the “Initial Working Capital,
 25 meaning “an amount equal to the Working Capital as of three business days prior to the Closing as
 26 estimated by [Morabito] at the Closing.” ARSPA, p. 9. Second, “[a]s promptly as possible after
 27

28 ¹ Under the ARSPA, “*Working Capital*” means, as of a given date, the amount calculated by subtracting the
 combined current liabilities of the Business [BHI] from the combined current assets of the Business [BHI] as of that

1 the Closing,” the Herbst Parties were required to provide Morabito with a “Closing Date Financial
 2 Report” setting forth a calculation of the Closing Date Working Capital (defined as “the Working
 3 Capital as of the Closing Date”) and the Working Capital Adjustment (defined as “the amount by
 4 which Closing Date Working Capital is greater than or less than the Initial Working Capital”). *Id.*
 5 at 3, 13, 15.

6 Third, “[i]f the Closing Date Working Capital [wa]s greater than the Initial Working
 7 Capital,” the Herbst Parties agreed to “pay the difference to [Morabito] via wire transfer within
 8 five business days after final determination of the Working Capital Adjustment.” *Id.* at 16,
 9 Section 2.6. However, “[i]f the Closing Date Working Capital [wa]s less than the Initial Working
 10 Capital,” Morabito was required to “pay the difference to the Herbst parties via wire transfer
 11 within five business days after final determination of the Working Capital Adjustment.” *Id.*

12 The dispute between the parties arose when they could not agree on the correct Working
 13 Capital Adjustment. Pursuant to the ARSPA, Morabito provided an estimate of the Initial
 14 Working Capital to the Herbst Parties in the amount of \$3,165,690. Thereafter, the Herbst Parties
 15 provided the Closing Date Working Capital, which they calculated to be a negative \$5,794,318.33.
 16 Morabito objected to the Herbst Parties’ Closing Date Working Capital calculation. Therefore,
 17 the Herbst Parties provided a revised calculation of the Closing Date Working Capital in the
 18 amount of a negative \$6,507,251.70. Based on this new calculation, the Herbst Parties contended
 19 Morabito owed them \$9,672,941.70. Under the ARSPA, if a disagreement regarding Working
 20 Capital arose, the parties agreed that Independent Accountants² would be “retained to undertake a
 21 determination of the Closing Date Financial Report.” ARSPA, p. 15.

22 Based on this Working Capital Dispute, among others, Consolidated Nevada Corp., Paul
 23 A. Morabito, and Washoe Construction Management Services, LLC (collectively, “Morabito”)
 24 initiated the State Court Action in December 2007 against JH, Inc., Jerry Herbst, Berry-Hinckley
 25 Industries, Herbst Gaming Inc., Terrible Herbst, Inc., Timothy P. Herbst, and Troy D. Herbst (the
 26 “Herbst Parties”). In Morabito’s Revised Third Amended Complaint, he asserted 16 different
 27

28 date, determined in accordance with the factors set forth on Schedule 1.1(aaaaa).”

²“Independent Accountants” was defined as “a firm of accountants mutually acceptable to Seller and Buyer; provided

1 claims against the Herbst Parties for, among other things, civil conspiracy, defamation, fraudulent
 2 misrepresentation, fraudulent inducement, breach of contract based on three different contracts the
 3 parties entered into, and breach of the implied covenant of good faith and fair dealing based on
 4 same. The Herbst Parties filed 18 counterclaims against Morabito for, among others, fraud in the
 5 inducement, negligent misrepresentation, breach of contract based on those same three contracts,
 6 breach of the implied covenant of good faith and fair dealing based on same, declaratory relief,
 7 fraud or intentional misrepresentation regarding the working capital, unjust enrichment, fraudulent
 8 conveyance, and conversion.

9 During the 2007 litigation, the district court appointed Douglas Wilson and his firm, the
 10 Douglas Wilson Companies (the “Independent Accountant”) to act as the independent accountant.
 11 The district court appointed the Independent Accountant pursuant to NRS 38.226 (Appointment
 12 of arbitrator; service as neutral arbitrator), Nevada Rule of Civil Procedure 53(a) (Appointment of
 13 master), and Section 2.5(d) of the ARSPA.

14 Following appointment of the Independent Accountant, more disputes occurred between
 15 the parties. One area of contention (among the many) arose from Morabito’s belief that the
 16 Independent Accountant had improper ex parte communications with David Wood, BHI’s CFO
 17 and Controller who was hired subsequent to the closing (“Wood”). Morabito felt that his team
 18 was unable to meaningfully participate in the process of determining the working capital of BHI
 19 because the Independent Account sought information and assistance from Wood on an ex parte
 20 basis. Furthermore, Morabito argued that the Independent Account overlooked the ARSPA and
 21 did not properly apply its definitions when making his report. Ultimately, Morabito felt that the
 22 Independent Accountant’s report was incorrect and improperly favored the Herbst Parties.

23 The district court confirmed the Independent Accountant’s report, and Morabito appealed
 24 that order. At trial, the district court determined that Morabito’s pre-closing estimate was
 25 fraudulent, while Morabito believed that it had been correct. The parties briefed the issues on
 26 appeal, but eventually dismissed the appeal pursuant to a settlement agreement.

27 / / /
 28

that such firm is independent from Buyer, Seller and BHI and its Subsidiaries.”

1 **B. 2016 Complaint**

2 In 2016, Morabito filed a Complaint alleging fraud on the state court. Morabito alleged
 3 that while he always believed his pre-closing estimate was correct, he could never reconcile or
 4 explain the discrepancy of his pre-closing estimate with the Herbst Parties' financial statements.
 5 Morabito averred that he learned that the Herbst Parties fraudulently manipulated the financial
 6 statements to move over \$1.9 million of accounts receivable from the pre-closing period to the
 7 post-closing period. Morabito alleged that he learned of the fraud through communicating with
 8 the nephew and brother of the CEO of Western Energetix, LLC, Walter Dwelle ("Dwelle").

9 Western Energetix, LLC was a party to the contracts with BHI in 2007 and its transactions
 10 were reflected in BHI's 2007 financial statements. In communicating with Dwelle's family
 11 members, Morabito contended he learned that the 2007 independently audited BHI financials
 12 included transactions with Western Energetix that never occurred. Morabito alleged these
 13 conversations prompted him to investigate the Herbst Parties' representations that ultimately
 14 caused the district court to find that Morabito had committed fraud which resulted in the State
 15 Court Judgment.

16 Morabito further alleged that prior to closing when CNC controlled and owned BHI, BHI's
 17 accounting staff had completed financial statements only through the end of April 2007. The
 18 parties agreed that Morabito would have final approval of any financial statements affecting the
 19 pre-closing tax period. The financial statements for the months end of May 2007 and June 2007,
 20 months in which CNC owned BHI, were not completed by BHI's accounting staff until after
 21 closing, by which point the Herbst Parties controlled BHI, which, according to Morabito, gave the
 22 Herbst Parties an opportunity to fraudulently manipulate the financial records. Thus, Morabito
 23 asserted three causes of action: fraud on the Court; NRCP 60(b)(3) fraud; fraudulent inducement;
 24 and fraudulent misrepresentation. Morabito alleged that the Confession of Judgment was
 25 premised on fraudulent representations and false statements knowingly made by the Herbst Parties
 26 regarding the manipulated financial statements.

27 After filing the Complaint, the Herbst Parties removed the action, and Morabito moved for
 28 remand. This Court denied the motion for remand. In the Order Denying Remand, this Court

1 noted that it “has not made a finding as to whether the Plaintiffs have independent standing apart
 2 from the estate to bring claims against the Defendants based upon the allegations of the
 3 Complaint.” Moreover, this Court determined that “any other claims belonging to the Plaintiffs
 4 and not to the bankruptcy estates and not asserted in the Complaint are not before the Court in this
 5 Adversary Proceeding and are not affected by this Order.”

6 **C. 2020 Proceedings**

7 In an attempt to assert a fraud on the court claim, alleged separate and apart from the
 8 bankruptcy estate, Morabito through counsel Hartman and Houston filed the Rule 60 Independent
 9 Motion. The Independent Motion includes several moving parts. It is clear that Hartman and
 10 Houston tried to anticipate the arguments of the Herbst Parties when drafting the Independent
 11 Motion. Therefore, it appears Hartman and Houston included several arguments that were
 12 unnecessary to the Independent Motion. Regardless, the goal of the Independent Motion was
 13 singular: bring forward evidence of a fraud on the State Court.

14 On the same day the Independent Motion was filed, Morabito also filed a Complaint for
 15 Declaratory Judgment and Request for Stay of Proceedings and Injunctive Relief in Adversary
 16 Proceeding 5002 (the “Injunction Complaint”). The Herbst Parties moved to dismiss Adversary
 17 Proceeding 5002, which Morabito opposed, but this Court granted.

18 Moreover, after the Independent Motion was filed, the Herbst Parties removed it to this
 19 Court in Adversary Proceeding 20-5003. Morabito filed a motion for remand, which this Court
 20 ultimately denied. The Independent Motion is still pending in Adversary Proceeding 5003. The
 21 Herbst Parties now seek sanctions based on the Independent Motion, the Injunction Complaint, the
 22 request for stay, and the Motion for Remand.

23 **III. STANDARD OF REVIEW.**

24 This Court has broad discretion to deny a request for sanctions. *See In re Grantham*
 25 *Brothers*, 922 F.2d 1438, 1441 (9th Cir.1991). “Rule 11 empowers federal courts to impose
 26 sanctions upon the signers of paper where a) the paper is ‘frivolous’, or b) the paper is filed for an
 27 ‘improper purpose’”. *Id.* “In considering sanctions under Rule 9011, the trial court must measure
 28 the attorney’s conduct objectively against a reasonableness standard, which consists of a

1 competent attorney admitted to practice before the involved court.” *In re Kayne*, 453 B.R. 372,
 2 382 (B.A.P. 9th Cir. 2011) (internal quotation marks omitted).

3 “The key question in assessing frivolousness is whether a complaint states an arguable
 4 claim—***not whether the pleader is correct in his perception of the law.***” *Hudson v. Moore Bus.*
 5 *Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir. 1987) (emphasis added). “Therefore, courts do not
 6 examine the complaint in the same manner as a court considering a Rule 12(b)(6) motion, because
 7 ultimate failure on the merits is irrelevant.” *Id.* Indeed, courts have expressly held that sanctions
 8 are not warranted merely because a complaint is dismissed. *See Ring v. R.J. Reynolds Indus., Inc.*,
 9 597 F. Supp. 1277, 1281 (N.D. Ill. 1984) (stating that “mere fact a complaint is dismissed does not
 10 make the attorney who files the complaint liable for sanctions”); *Robinson v. C.R. Laurence Co.*,
 11 105 F.R.D. 567, 568 (D. Colo. 1985) (“A defendant is not entitled to attorney fees as an automatic
 12 consequence of success on a motion to dismiss for failure to state a claim.”). Additionally,
 13 “because of the objective standard applicable to Rule 11 analyses, a complaint that is found to be
 14 well-grounded in fact and law cannot be sanctioned as harassing, regardless of the attorney’s
 15 subjective intent.” *Hudson*, 836 F.2d at 1159.

16 Here, it is clear that although this Court determined Hartman and Houston made mistakes
 17 in the Independent Motion, the papers filed were not frivolous or filed for an improper purpose.

18 **IV. LEGAL ARGUMENT**

19 **A. The Independent Motion, Injunction Complaint, Stay Motion, and Remand Motion** 20 **Are Not Frivolous.**

21 The Herbst Parties argue the following documents filed by Hartman and Hartman warrant
 22 sanctions: the Independent Motion, Injunction Complaint, Stay Motion Pleadings, and Remand
 23 Motion Pleadings. A claim is frivolous if it is “both baseless and made without a reasonable and
 24 competent inquiry.” *In re Grantham Bros.*, 922 F.2d at 1442. “A frivolous claim is one that is
 25 legally unreasonable, or without legal foundation.” *Id.* (internal quotation marks omitted).

26 It is undisputed that Hartman and Houston’s Independent Motion and Injunction
 27 Complaint are not perfect. Indeed, they contain mistakes. For example, Hartman and Houston
 28 alleged in the Independent Motion that the fraud on the court would result in the Bankruptcy

1 orders, including the Non-Dischargeable Order and the Abandonment Order, being vacated. In
 2 Hartman and Houston's view, this would likely be the ultimate result if the Independent Motion
 3 were successful because the Confession of Judgment would be vacated, and the Bankruptcy
 4 proceedings are predicated on the Confession of Judgment. Clearly, Hartman and Houston know
 5 that the State Court cannot unwind Bankruptcy proceedings. And Hartman and Houston
 6 immediately clarified that point to this Court in the Amended Motion for Remand to correct their
 7 representation to the contrary. *See* Amended Motion for Remand of Removed Proceeding;
 8 Request for Abstention (on file in Adversary Proceeding 5003), p. 9-10 ("In the event the State
 9 Court grants the requested relief, Morabito will seek to have this Court take such additional action
 10 as may be necessary and appropriate.").

11 Hartman and Houston appear to have gotten ahead of themselves in making allegations
 12 regarding the State Court's ability to affect this Court's orders, but they have acknowledged their
 13 mistake and expressed their intent to correct that mistake. That allegation in the pleading does not
 14 render the Independent Motion frivolous. *See Golden Eagle Distrib. Corp. v. Burroughs Corp.*,
 15 801 F.2d 1531, 1540-41 (9th Cir. 1986) ("Nothing in the language of the Rule or the Advisory
 16 Committee Notes supports the view that the Rule empowers the district court to impose sanctions
 17 on lawyers simply because a particular argument or ground for relief contained in a non-frivolous
 18 motion is found by the district court to be unjustified.").

19 To establish standing and that the Independent Motion was filed in the correct court,
 20 Hartman and Houston asserted that Morabito was individually seeking declaratory relief separate
 21 and apart from the bankruptcy estate. *See* Independent Motion, ¶9-¶10. This Court has expressed
 22 that these allegations were merely conclusory legal allegations rather than factual assertions,
 23 therefore not satisfying Rule 12(b)(6). But even if they are characterized as legal conclusions,
 24 including them in the Independent Motion does not cause it to be a frivolous motion. Moreover,
 25 such allegations demonstrate that Hartman and Houston intended to state an independent claim for
 26 fraud on the Court, even if this Court ultimately concludes their attempt fails.

27 These shortcomings do not detract from the fact that the foundation and function of the
 28 Independent Motion is well grounded in fact and law. *Golden Eagle Distrib. Corp.*, 801 F.2d at

1 1540-41 (“In short, the fact that the court concludes that one argument or sub-argument in support
 2 of an otherwise valid motion, pleading, or other paper is unmeritorious does not warrant a finding
 3 that the motion or pleading is frivolous or that the Rule has been violated.”). The purpose of the
 4 Independent Motion was to set forth a fraud on the Court. “Fraud upon the court” has been
 5 recognized for centuries as a basis for setting aside a final judgment, sometimes even years after it
 6 was entered. *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 245, 64 S.Ct. 997 (1944) (discussing
 7 “the historic power of equity to set aside fraudulently begotten judgments” and canvassing cases
 8 and treatises and vacating a judgment entered nine years earlier), *overruled on other grounds by*
 9 *Standard Oil Co. of Cal. v. United States*, 429 U.S. 17, 18, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976).

10 To promote finality of judgment, final judgments are not “normally” subject to challenge.
 11 *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 653, 218 P.3d 853, 858 (2009). “However, the policy of
 12 repose yields when ‘the court finds after a proper hearing that fraud has been practiced upon it, or
 13 the very temple of justice has been defiled.’” *Id.* (quoting *Universal Oil Co. v. Root Rfg. Co.*, 328
 14 U.S. 575, 580, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946)). “[A] case of fraud upon the court [calls]
 15 into question the very legitimacy of the judgment.” *Id.* (quoting *Calderon v. Thompson*, 523 U.S.
 16 538, 557, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998) (alteration in original)). “Put another way,
 17 [w]hen a judgment is shown to have been procured by fraud upon the court, no worthwhile interest
 18 is served in protecting the judgment.” *Id.* (internal quotation marks omitted) (alteration in
 19 original).

20 Moreover, whether judgment was entered through settlement or otherwise, it is subject to
 21 being vacated where after discovered fraud exists. *Hazel-Atlas Glass Co.*, 322 U.S. at 244, 64 S.
 22 Ct. at 1000 (“From the beginning there has existed along side the term rule a rule of equity to the
 23 effect that under certain circumstances, one of which is after-discovered fraud, relief will be
 24 granted against judgments regardless of the term of their entry.”). Thus, there is, at least, a
 25 reasonable basis to argue *Hazel* would extend to a Confession of Judgment.

26 The person alleging a fraud on the Court carries a heavy burden. The Nevada Supreme
 27 Court has adopted a definition of “fraud upon the court” which states that

28 the concept embrace[s] only that species of fraud which does, or attempts to,

1 subvert the integrity of the court itself, or is a fraud perpetrated by officers of the
 2 court so that the judicial machinery cannot perform in the usual manner its
 3 impartial task of adjudging cases . . . and relief should be denied in the absence of
 such conduct.

4 *Id.* at 654, 218 P.3d at 858.

5 Notably, this Court and the United States Bankruptcy Appellate Panel of the Ninth Circuit
 6 (“BAP”) recognized that an independent claim for fraud on the Court *may* exist. *See* Transcript of
 7 Motion for Remand of Removed Proceedings, August 3, 2017, p. 53:8-13 (“[W]hen I read Rule 60
 8 and the language, whether it be in 60(d) in the federal rule or just included as part of 60(b) in the
 9 state rule, [it] says they can bring an independent action if somebody believes there’s been fraud
 10 upon the court. Read it. Tell me how any bankruptcy court has the power to say they can’t do
 11 that.”); Bankruptcy Appellate Panel (“BAP”) Transcript dated October 30, 2018, p. 8 (“But the
 12 bankruptcy judge acknowledged another possibility: if the complaint included a fraud upon the
 13 court independent action, he could sever that claim from the complaint and remand it, and only it,
 14 to state court.”).

15 This Court has determined that Hartman and Houston did not allege adequate facts to
 16 identify an independent claim for fraud on the Court. Doing so would be admittedly difficult
 17 giving the relatedness of Morabito and the Debtor. However, this Court and the BAP have
 18 acknowledged that pursuing such independent action is legally tenable. Thus, nothing Hartman
 19 and Houston filed is frivolous as it is grounded in established law. While the execution was not
 20 perfect, the motions and Injunction Complaint are certainly not frivolous.

21 The Herbst Parties attack the Independent Motion as barred by res judicata. But it is
 22 certainly not clear from the face of the Independent Motion that such proposition is true. Indeed,
 23 if the Court accepted that Morabito was stating an independent action for fraud on the Court, it
 24 should not be barred. Even the BAP recognized that this Court did not reach the merits of the
 25 2016 Complaint. *See* BAP Transcript, October 30, 2018, p. 26-27 (“But supposing that the
 26 bankruptcy court is wrong and the complaint asserted the Morabito Parties’ individual claims,
 27 even then, the bankruptcy court did not reach the merits of the individual claims, so the Morabito
 28 Parties would be free to assert them by motion or independent equitable action.”) (citing *NC-DSH*,

1 *Inc.*, 125 Nev. at 653 (“[d]enial of relief [by motion in the [rendering court] will bar an
 2 independent equitable action in another court, unless the denial was on a ground that precluded
 3 reaching the merits of the motion, or the circumstances have changed” (alterations in original)
 4 (quoting Wright, Miller & Kane, *Federal Practice and Procedure* § 2868)).

5 The BAP directly explained that a subsequent equitable action would not be barred by res
 6 judicata. Hartman and Houston reasonably relied on the BAP’s insight. *United States v.*
 7 *Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995) (“**Litigants need to be able to trust the oral**
 8 **pronouncements of district court judges.**”) (emphasis added). This Court, too, contemplated
 9 that Morabito would not be precluded from bringing an independent action. Transcript of Motion
 10 for Remand of Removed Proceedings, August 3, 2017, p. 58:1-5 (“I do not think that in any way is
 11 Mr. Morabito precluded by this ruling or candidly, because I made that clear, I thought, in
 12 paragraph 111 of my findings, to bring any independent action that he thinks is appropriate under
 13 Rule 60(b) under Nevada Rules of Civil Procedure.”).

14 **B. Hartman and Houston Conducted a Reasonable Inquiry into the Facts and Law.**

15 Hartman and Houston learned the 13-year history of this case. While the Herbst Parties
 16 fault Hartman and Houston for linguistic choices, i.e., whether the working capital issue was “set
 17 aside,” the parties largely agree on the history of the litigation.³ Obviously, this Court is well
 18 versed in the history of the litigation. The clear area of contention for the parties is the
 19 truthfulness, or lack thereof, of the Herbst Parties in making certain representations to the Court
 20 and the Independent CPA during the state court trial.

21 After learning the history of the litigation, Hartman and Houston gathered the factual
 22 information from their client. Thereafter, Hartman and Houston continued their investigation by

23
 24 ³ Hartman and Houston note that the In Limine Orders speak for themselves. The Herbst Parties admit that “Judge
 25 Adams did not try the issue during the ‘State Court Trial.’” Motion, p. 23. That is what Hartman and Houston meant.
 26 The Herbst Parties’ attempt to make it seem as though Hartman and Houston made blatant misrepresentations to this
 27 Court should be rejected. Hartman and Houston were simply informing the Court that the Working Capital issue was
 28 not litigated at trial. Hartman and Houston never represented that the Ind-CPA’s report was not confirmed by Judge
 Adams. Even if Hartman and Houston misconstrued the In Limine Orders, this Court certainly was not misled by
 Hartman and Houston’s interpretation of those orders. Any mistake in construing the In Limine Orders is not
 sanctionable. *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 281 (4th Cir. 2006) (“Even assuming that . . . [the] lawyers
 made a mistake in drawing an inference from a general disclosure document that was contradicted by a program-
 specific document, this mistake did not compel the district court to find a Rule 11(b) violation. The rule required some
 evidentiary support for the market-making revenue claim, but it did not require perfection.”).

1 reviewing reports from three experts: Randy Wagner, Victor Song, and Richard Speier, Jr.

2 Randy Wagner is a certified public accountant (“CPA”), has a master’s degree in business
 3 administration, and a master’s degree in international management. *See Exhibit 1* (Wagner
 4 Declaration). Victor Song is a former employee of the Internal Revenue Service (“IRS”), where
 5 he worked from 1981-2011 in various roles, including Chief of IRS Criminal Investigation,
 6 Deputy Chief of IRS Criminal Investigation, Director of Field Operations Pacific Area for IRS
 7 Criminal Investigation. *See Exhibit 2* (Declaration of Victor Song without exhibits).⁴ Richard
 8 Speier, Jr. served 29 years as a special agent, manager, and executive with the IRS Criminal
 9 Investigation. *See Exhibit 3* (Song and Speier Memorandum). Richard Speier, Jr. worked in
 10 various roles at the IRS, including Special Agent in Charge, Acting Chief Criminal Investigation,
 11 and Deputy Chief. *Id.*

12 These distinguished expert witnesses reviewed the issues surrounding fraud on the Court
 13 and opined that the Herbst Parties manipulated and manufactured evidence to perpetuate a fraud
 14 on the Court. *See Exhibit 3*.

15 Specifically, Mr. Wagner examined the Superpumper computer servers in Scottsdale,
 16 Arizona and “discovered that the computers had stored backups of the records of BHI and
 17 PAMCO which originated Pre-2007 on the BHI servers.” **Exhibit 1** (Wagner Declaration). Mr.
 18 Wagner informed Morabito and his counsel that based on his analysis of the evidence presented to
 19 the State Court, it his opinion that the Herbst Parties “knowingly and willfully perpetrated a
 20 scheme to defraud the State Court and [Morabito].” Mr. Wagner provided a report with detailed
 21 analysis of the fraud on the Court. *See Exhibit 4* (Wagner Report).

22 Moreover, Mr. Song reviewed Mr. Wagner’s report and determined that the “dividend
 23 portrayed on the 6/30/2007 balance sheet had been previously recorded by the defendant’s
 24 accounting staff and should not have appeared on the balance sheet for 6/30/2007 prepared by Mr.
 25 Wood and his staff on 8/27/2007. Accordingly, any court relying on the legitimacy of the
 26 ‘dividend’ was misled.” **Exhibit 2** (Declaration of Victor Song), p. 4. Mr. Speier also reviewed
 27

28 ⁴ To avoid overburdening the Court with repetitive documents, Hartman and Houston do not attach the exhibits to Mr. Song’s declaration. If the Court would like those documents, Hartman and Houston will provide them.

1 Mr. Wagner's report and determined that a fraud on the Court occurred. **Exhibit 3** (Song and
 2 Speier Memorandum). Mr. Speier and Mr. Song concluded that the Herbst Parties' "counsel,
 3 acknowledged in an email that they possessed the 12/31/06 balance sheet that the defendant later
 4 stated he did not have. This was inaccurate and misleading." *Id.* at 12.

5 Three experts conducted factual investigations and came to the same conclusion. Hartman
 6 and Houston did not only rely on their client's version of what occurred, but also independently
 7 investigated the facts. Hartman and Houston were entirely justified in relying upon these experts
 8 in drafting the Independent Motion.

9 Finally, the Herbst parties unfairly attack Hartman and Houston by misconstruing Hartman
 10 and Houston's argument regarding the BHI Check Register. The Herbst Parties argue that
 11 Hartman and Houston aver that John Desmond and Gerald Gordon obtained the Abandonment
 12 Order and Nondischarge Judgment by defrauding the Court through Gordon's transmission of the
 13 BHI 2006 Check Register. **Hartman and Houston never made that argument.**

14 Rather, Hartman and Houston alleged that Gordon's August 22, 2019 e-mail wherein he
 15 sent Hartman and Houston the purported BHI Check Register was the first evidence that
 16 corroborated their theory that Gordon committed fraud on the Court in 2010 and that demonstrated
 17 Wood fraudulently re-created certain BHI financial statements. *See* Independent Motion, p. 25.
 18 The Herbst Parties' attempt to mislead this Court must be rejected. Exhibit 58 to the Independent
 19 Motion (a comparison of Gordon's BHI Check Register to actual BHI Financials) is exactly the
 20 "adequate legal and factual foundation" upon which Hartman and Houston based their allegations.

21 Accordingly, Hartman and Houston had a reasonable factual basis to move forward with
 22 the Independent Motion, Injunction Complaint, Stay Motion, and Remand Motion.

23 **V. THIS COURT SHOULD DECLINE FURTHER SANCTIONS.**

24 The district court has wide discretion in determining the appropriate sanction for a Rule 11
 25 violation. *Hudson v. Moore Bus. Forms, Inc.*, 836 F.2d 1156, 1163 (9th Cir. 1987). As to the type
 26 of sanction imposed under Rule 11, the court "should utilize the least severe sanction that furthers
 27 the purposes of Rule 11 and is the least severe sanction adequate to such purpose." *Jenkins v.*
 28 *Methodist Hospitals of Dallas, Inc.*, 478 F.3d at 265 (quoting *Thomas v. Capital Security Services*,

1 *Inc.*, 836 F.2d at 878). *Marceaux v. Lafayette City-Par. Consol. Gov't*, 14 F. Supp. 3d 760, 767
 2 (W.D. La. 2014), *aff'd*, 614 F. App'x 705 (5th Cir. 2015).

3 At the hearing on the Motion for Remand and the Motion to Dismiss the Injunction
 4 Complaint, this Court reprimanded Hartman and Houston from the bench. If this Court
 5 determines that sanctions are appropriate, this Court should decline to impose further sanctions
 6 beyond the public reprimand.

7 Given the unique circumstances of this case, Hartman and Houston ask this Court to view
 8 the request for sanctions in the context of the purpose of Rule 11. An award of Rule 11 sanctions
 9 raises two competing concerns: the desire to avoid abusive use of the judicial process and to avoid
 10 chilling zealous advocacy.⁵ *In re Yagman*, 796 F.2d 1165, 1182, *amended*, 803 F.2d 1085 (9th
 11 Cir. 1986). The Ninth Circuit "has noted that sanctions should not be used to chill an attorney's
 12 enthusiasm or creativity in pursuing factual or legal theories." *Hudson v. Moore Bus. Forms, Inc.*,
 13 836 F.2d 1156, 1159-60 (9th Cir. 1987). As the advisory committee has explained, "[t]he word
 14 'sanctions' in the caption, for example, stresses a deterrent orientation in dealing with improper
 15 pleadings, motions, or other papers." Fed. R. Civ. P. 11 advisory committee's note.

16 Thus, "federal courts [should] seek to implement [Rule 11] in a manner that accurately
 17 reflects the intent of the drafters to permit imaginative and vigorous advocacy." Daniel E.
 18 Lazaroff, *Foreword—Third Annual Fritz B. Burns Lecture on Rule 11 Reform: Progress or*
 19 *Retreat on Attorney Sanctions*, 28 Loy. L.A. L. Rev. 1, 5 (1994). "Aggressive use of rule 11
 20 sanctions to punish lawyers threatens to chill vigorous advocacy and restrict access to the courts in
 21 ways that have not been intended by the drafters." Melissa Lee Nelken, *Sanctions Under*
 22 *Amended Federal Rule 11- Some "Chilling" Problems in the Struggle Between Compensation and*
 23 *Punishment*, 74 Geo.L.J. 1313, 1324 (1986).

24 As one commentator noted, "if deterrence is Rule 11's goal, as the courts proclaim, a court
 25 should focus on whether a given sanction improves or enhances professional responsibility"

27 ⁵ "The language of Rule 9011(a) is virtually identical to that of Fed.R.Civ.P. 11, and therefore, courts considering
 28 sanctions under Rule 9011(a) rely on Rule 11 cases." *In re Grantham Bros.*, 922 F.2d 1438, 1441 (9th Cir. 1991).
 Moreover, "[b]ecause the analysis of sanctions is essentially identical under Rules 9011(a) and Rule 11, [courts] use
 the terms interchangeably." *Id.*

1 Victor H. Kramer, *Viewing Rule 11 As A Tool to Improve Professional Responsibility*, 75 Minn. L.
 2 Rev. 793, 804-05 (1991). Given the complex history of this case, complicated area of law, and the
 3 lack of improper purpose in filing the challenged documents, a less severe sanction is warranted.

4 “[A]s a less severe alternative to monetary sanctions, district courts may choose to
 5 admonish or reprimand attorneys who violate Rule 11.” *Thomas v. Capital Sec. Servs., Inc.*, 836
 6 F.2d 866, 878 (5th Cir. 1988); *Morris v. Wachovia Sec., Inc.*, 448 F.3d 268, 284-85 (4th Cir. 2006)
 7 (“As a nonmonetary sanction, a court may, for example, strike a document, *admonish a lawyer*,
 8 require the lawyer to undergo education, or refer an allegation to appropriate disciplinary
 9 authorities.”) (emphasis in original). In *Thomas*, the Fifth Circuit explained that the “appropriate”
 10 sanction under Rule 11 can include a variety of options. *Thomas*, 836 F.2d at 878 (“What is
 11 “appropriate” may be a warm friendly discussion on the record, a hard-nosed reprimand in open
 12 court, compulsory legal education, monetary sanctions, or other measures appropriate to the
 13 circumstances. Whatever the ultimate sanction imposed, the district court should utilize the
 14 sanction that furthers the purposes of Rule 11 and is the least severe sanction adequate to such
 15 purpose.”).

16 The Herbst Parties request sanctions in the form of attorney fees, thereby asking this Court
 17 to impose sanctions for the purpose of compensation. But it must be noted that “[t]he rule
 18 provides for sanctions, *not fee shifting*. It is aimed at deterring conduct rather than merely
 19 compensating the prevailing party. The key to invoking Rule 11, therefore, is the nature of the
 20 conduct of counsel and the parties, not the outcome.” Schwarzer, *Sanctions Under the New Rule*
 21 *11—A Closer Look*, 104 F.R.D. 181, 185 (1985) (emphasis added); *In re Kunstler*, 914 F.2d 505,
 22 522 (4th Cir. 1990) (disallowing award of attorney fees which compensated defendants “rather
 23 than . . . deter[ring] improper litigation”).

24 Rather than imposing fines or ordering payment of attorney fees, a court’s condemning
 25 language can be a severe sanction in itself. Nelken, 74 Geo.L.J. at 1332; Miller & Culp, *Litigation*
 26 *Costs, Delay Prompted the New Rules of Civil Procedure*, Nat’l L.J., Nov. 28, 1983, at 34, col. 4
 27 (“In some cases, an ‘appropriate’ sanction will be nothing more than an oral reprimand by the
 28 court or an expression of disagreement with the lawyer’s decision.”).

In this case, Hartman and Houston did not execute the filings perfectly, but they did not act incompetently or in bad faith. This Court already reprimanded Hartman and Houston in open court. This Court was highly critical of the Independent Motion and Injunction Complaint. As the Honorable Judge Schwarzer has acknowledged, there is a certain “sting” when “public criticism [is] delivered from the bench. Such criticism, while potentially constructive, can also damage a lawyer’s reputation and career” *See* Schwarzer, *supra*, at 201. This Court’s reprimand was constructive and certainly served to deter each attorney watching the hearing from filing anything that could be construed as improper. Hartman and Houston have acknowledged their mistakes from the beginning and have learned the importance of careful drafting. Thus, no further sanction is necessary.

VI. CONCLUSION

Based on the foregoing, Hartman and Houston respectfully request that this Court deny the Motion.

DATED this 15th day of December, 2020.

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CERTIFICATE OF SERVICE

Pursuant to FRBP 7005 and FRCP 5(b), I certify that I am an employee of Robison, Sharp, Sullivan & Brust, that I am over the age of 18 and not a party to the above-referenced case, and that on the date below I caused to be served a true copy of the OPPOSITION TO MOTION FOR AN ORDER IMPOSING SANCTIONS AGAINST JEFFREY HARTMAN, ESQ. AND HARTMAN & HARTMAN AND DAVID HOUSTON, ESQ. AND THE LAW OFFICES OF DAVID R. HOUSTON PURSUANT TO BANKRUPTCY RULE 9011 on all parties to this action by the method(s) indicated below:

X I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court by using the ECF system which served the following parties electronically:

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27 teresa@nvlawyers.com;eileen@nvlawyers.com;kim@nvlawyers.com;stefan
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29 X by placing an original or true copy thereof in a sealed envelope, with sufficient postage
30 affixed thereto, in the United States mail at Reno, Nevada, addressed to:

31 BMW FINANCIAL SERVICES NA, LLC
32 C/O ASCENSION CAPITAL GROUP
33 4515 N. Santa Fe Avenue
34 Oklahoma City, OK 78118-7981

35 BMW FINANCIAL SERVICES NA, LLC DEPARTMENT
36 ASCENSION CAPITAL GROUP
37 4515 N. Santa Fe Avenue
38 Oklahoma City, OK 78118-7981
39 JOHN P. DESMOND on behalf of Defendants BERRY-
40 HINCKLEY INDUSTRIES, JH, INC., MARYANNA HERBST,
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DATED: This 15th day of December, 2020.

/s/ V. Jayne Ferretto

Employee of Robison, Sharp, Sullivan & Brust